

ROUTING AND RECORD SHEET

SUBJECT: (Optional) Suggested Change in FOIA Policy in Agency Responses to Requesters

DD/A Registry

81-2701

FROM: [Redacted]
Director of Information Services
1206 Ames

EXTENSION

NO.

OIS 81-1173

DATE

29 December 1981

TO: (Officer designation, room number, and building)

DATE

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across columns after each comment.)

RECEIVED

FORWARDED

1.

DDA

12-29-81

2

Harry:

FILE:

Legal

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IG

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6.

DDA Distribution:

Orig PRS - IG w/atts

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Chuck,

12.

After you have had a chance to review this I

13.

would like to discuss it at your convenience.

15.

The attached documents are pertinent to the question you raised yesterday of omitting the names of deniers to FOIA requesters as suggested by Chuck Briggs. The first document is the Attorney General's memorandum discussing the changes in the law and his interpretation of those amendments. The second memorandum, written by Dick [Redacted] (of which only pages 3 and 4 are germane to this issue and which I have highlighted for you), is a discussion of the expected impact which implementation will have on the CIA.

I discussed changing our present procedures with Ernie [Redacted] who believes it is too late now to change our policy. He believes we might have made a case for omitting the names of FOIA deniers in 1975, but today we would be unable to establish a rationale for doing that. He also believes there is nothing to be gained by withholding the names. [Redacted] and [Redacted] cited the "climate of the times" as the reason for providing the names after the new amendments went into effect. Hal also mentioned that Mr. Colby, then DCI, instructed that we would comply not only with the law but with the intent of the law.

I would like to discuss further after you have had a chance to read the attached.

Atts

81-2701

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ATTORNEY GENERAL'S MEMORANDUM

ON THE

1974 AMENDMENTS

TO THE

FREEDOM OF INFORMATION ACT



UNITED STATES DEPARTMENT OF JUSTICE

FEBRUARY 1975

Note: This copy is part of an initial duplication made to permit distribution by February 19, 1975. A supply of printed and bound copies of this memorandum in the form of a 6" x 9" booklet will be available within a few days.

II-D: DISCIPLINING OF PERSONNEL RESPONSIBLE FOR ARBITRARY
AND CAPRICIOUS WITHHOLDING

Among the changes in the Act effected by the 1974 Amendments is the addition of the following provision concerning disciplining of agency personnel, 5 U.S.C. 552(a)(4)(F):

"Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends."

Congress did not expect this provision to be invoked often, but only "in unusual circumstances." 120 Cong. Rec. H 10002 (Oct. 7, 1974) (Congressman Moorhead); see also 120 Cong. Rec. H 10006 (Oct. 7, 1974) (Congressman Erlenborn). The provision originated in the Senate bill, under which the court was required to take action if it found that the employee's withholding of records was "without reasonable basis in law." The Conference Committee changed this to "arbitrarily and capriciously." See Conf. Rept. p. 10. It is thus clear that, to justify commencement of Civil Service Commission proceedings, much more is required than a judicial determination that an agency has erred in its interpretation of the Act.

The procedures to be followed by the Civil Service Commission were discussed by Congressman Moorhead, 120 Cong. Rec. H 10001-2. He stated that they might include a hearing, and would be in accord "with regular civil service procedures." The employee's rights would include "the right to appeal any adverse finding by the Commission." The statute directs the agency in question to "take the corrective action that the Commission recommends," and without further specification leaves the choice of such corrective action to the discretion of the Commission.

The court's findings under §552(a)(4)(F) relate to "the officer or employee who was primarily responsible for the withholding." Within an agency, responsibility for withholding is coextensive with authority to deny. The agency should therefore fix such authority with absolute clarity in its regulations, both with respect to initial denials and appeals. On this point, see pp. 13-15 of the December 11, 1974 Preliminary Guidance Memorandum, Appendix III-B, below.

In addition to the special problems relating to the case of a request for records classified by another agency (see I-A above), occasions will arise in which the protection of information contained in a record held by one agency is of primary concern to another agency. The 1974 Amendments explicitly recognize the existence of such situations by making special provision for agency consultation in such circumstances. See 5 U.S.C. 552(a)(6)(B)(iii). When a denial is made at the request of another agency, and out of regard for its primary interest or expertise, the person in the other agency who made the request to deny may be a "person responsible for the denial." 5 U.S.C. 552 (a)(6)(C). However, such a result might be proper only if he is advised by the withholding agency, before his final recommendation to deny is accepted, that he will be so designated in the denial letter, and is in fact so designated.